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No. 94-126

In The

Supreme Court of the United States

October Term, 1994

LEE WEATHERLY,

Petitioner,

v.

FEDERAL DEBT MANAGEMENT, INC.,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Texas

BRIEF OF RESPONDENT FEDERAL DEBT MANAGEMENT, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Do assignees and transferees of failed bank assets purchased from the FDIC, receive in the assignment and transfer of the underlying substantive right, the right and benefit of the six-year statute of limitations enjoyed by FDIC pursuant to 12 U.S.C. § 1821(d)(14), as a matter of federal law.

II. Whether 12 U.S.C. § 1821(d)(14) is a right, interest, or benefit of the FDIC that runs with an assignment of the underlying substantive right to FDIC's assignees.

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BRIEF OF RESPONDENT FEDERAL DEBT MANAGEMENT, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT:

The Respondent, Federal Debt Management, Inc., respectfully requests that this Court deny Petition for Writ of Certiorari submitted by the Petitioner, Lee Weatherly.

JURISDICTION

Jurisdiction of this Court is sought to be invoked under 28 U.S.C. § 1257(a).

However, as noted below, there are no conflicts among the United States Court of Appeals on the issue involved here, nor has such a Court decided a federal question in a way that would conflict with a state court of last resort or so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 10.1(a), Supreme Court Rules. Further, no state court of last resort has decided the federal issues involved in this suit in conflict with the decision of another state court of last resort. Rule 10.1(b), Supreme Court Rules.

The decisions of the United States Court of Appeals for the Fifth Circuit and the various state courts of last resort are in harmony with the decisions of this Court and each court has shown its ability to decide this important question of federal law without the necessity of the supervision of this Court. Rule 10.1(c), Supreme Court Rules.

STATUTE INVOLVED

12 U.S.C. §§ 1821(d)(14)(A), (B).

STATEMENT OF THE CASE

The question before the Court is a case of first impression involving the application of the right, interest and benefit of the federal six-year statute of limitations, 12 U.S.C. § 1821(d)(14), as added by the Financial Institutions Reform, Recovery and Enforcement Act of 1989,

Pub. L. 101-73, 103 Stat. 183 ("FIRREA"), Title XII, to assignees and transferees of assets purchased from the FDIC.

The issue presented is whether assignees and transferees of failed bank assets purchased from the Federal Deposit Insurance Corporation ("FDIC") receive as part of the assignment and transfer, as a matter of federal law, the right and benefit of the federal six-year statute of limitations enjoyed by FDIC pursuant to 12 U.S.C. § 1821(d)(14).

Respondent agrees with the statement of the case stated by Petitioner except in the following particulars.

From the commencement of this suit on April 15, 1991, Respondent, Federal Debt Management, Inc. (hereinafter "FDM" or "Respondent"), asserted that it was the assignee and transferee of the notes in question from the FDIC pursuant to those exhibits evidencing assignment and transfer attached to FDM's Original Petition ("Petition"). FDM argued in response to Petitioner's Motion For Summary Judgment that the Texas four-year statute of limitations did not apply, but that the federal six-year statute of limitations cited above applied to the time limits available to FDM's right to recover in this case.

At the time that the FDIC acquired the notes in question, there is no question that the respective causes of actions on all three notes were still alive. In fact, the cause of action on one of the notes involved did not even accrue until after FDIC acquired the notes on September 25, 1986. Further, there is no question that had the FDIC held on to the notes in question it would have had until

at least September 2, 1992 through November 3, 1992 to file suit on the respective notes.

On August 9, 1989, FIRREA was enacted creating 12 U.S.C. § 1821(d)(14). All causes of action on the notes were still alive and were still owned by the FDIC as receiver for Heritage National Bank ("FDIC Receiver"). The exhibits attached to FDM's Petition show that the FDIC-Receiver sold, transferred, and assigned the notes to FDM on November 7, 1989[1], nearly three months after the enactment of FIRREA. Thus, this case does not necessarily require the retroactive application of FIRREA to claims in existence on August 9, 1989.

REASONS FOR NOT GRANTING THE WRIT

I. The Passing of the Federal Six-Year Statute of Limitations to Assignees With the Assignment of Underlying Substantive Rights Enhances FDIC's Ability to Efficiently Liquidate Assets of Failed Institutions.

The FDIC was established under authority of Section 8 of the Banking Act of 1933, and Section 101 of the Banking Act of 1935, which became effective August 23, 1935, and which provided the permanent plan of deposit insurance contained in existing law. H. R. Rep. No. 2564, 81st Cong., 2d Sess. (1950), *reprinted in* 1950 U.S.C.C.A.N.

[1] The Briefs of the parties below, including FDM, and the opinions below state that the notes were assigned on October 27, 1989. Further review of the respective Bills of Sale attached to FDM's Petition reveal that they were executed November 7, 1989. The difference is not material to the issues in the case but is only cited for clarity.

3765. The Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1811, *et seq.*, which established and created the FDIC, was originally enacted as Section 12B of the Federal Reserve Act, 12 U.S.C. § 264 (1933).

The purpose of the FDIC, as articulated in the FDIA, is to bring to depositors sound, effective, and uninterrupted operation of the banking system with resulting safety and equity of bank deposits. H. R. Rep. No. 2564, 1950 U.S.C.C.A.N. at 3765-66.

The FDIC traditionally had two choices in the disposition of failed bank assets: straight liquidation and distribution to depositors and creditors or transferring such assets to an assuming bank thereby lessening the potential negative impact on the insurance fund. *Gunter v. Hutcheson*, 674 F.2d 862, 865 (11th Cir.), *cert. denied*, 459 U.S. 1059 (1982).

Over time, the FDIA has been amended to provide the FDIC with greater authority and power. Initial amending legislation gave the FDIC added authority to make loans, purchase its assets, or make deposits in order to prevent the closing of an insured bank.[2]

The increased number of bank failures in the mid-1980s together with geographic concentration of banking problems and the large size of some troubled banks made it increasingly difficult for the FDIC to efficiently liquidate the assets of failed banks. S. Rep. 19, 100th Cong. 1st Sess. (1987), *reprinted in* 1987

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[2] H. R. Rep. No. 2564, 1950 U.S.C.C.A.N. at 3773-74, 3777-78.

U.S.C.C.A.N. 491, 511-12. In an effort to deal with growing problems among financial institutions, the FDIC sought legislation to enhance its ability to handle failed and failing banks with minimum disruption to local economies and minimum costs to the insurance fund.

As a result, Congress initially enacted the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552 (1987) (the "Bridge Bank Statute"). Two years later, Congress enacted FIRREA. One of the main goals of both pieces of legislation was to enhance FDIC's ability to find purchasers of failed bank assets and obtain the best possible price for such banking business, thus lessening the potential negative impact on the FDIC insurance fund. S. Rep. 19, 1987 U.S.C.C.A.N. at 512; FIRREA, Section 101(8).

Congress authorized suits by FDIC in its corporate capacity ("FDIC-Corporate"), in assets acquired from FDIC as receiver that are not transferred to an assuming bank, in order that FDIC might recoup, or at least mitigate, the losses to the insurance fund (and, in large measure, ultimately to the taxpayers) that result from bank failure. *FDIC v. Bank of Boulder*, 911 F.2d 1466, 1470 (10th Cir. 1990), *cert. denied*, 499 U.S. 904 (1991).

Until recently, the FDIC almost always sought to recover such losses by bringing suit in its own name, as evidenced by the hundreds of reported decisions involving FDIC suits on notes, guarantees and other instruments or assets acquired by purchase and assignment from FDIC as receiver.

In recent years, however, the sheer volume of assets coming into the hands of the FDIC has forced the FDIC to

attempt to realize value for some of such assets in ways other than bringing suit in its own name. One of the alternative methods by which the FDIC does so is by selling such assets to third parties at their market value. Jeffrey M. Sharp, *Extending the FDIC's "Super Powers" to its Transferrees: A Vehicle for Privatizing Loss Recovery*, 97 Com. L.J. 49, 59, 66 (1992) [hereinafter "Sharp"].

Contrary to Petitioner's unsupported statement that these investors hope "to gain a windfall at the expense of the FDIC and . . . the taxpayers" the application of the six-year statute of limitations benefits both. *Id.*; James J. Boteler, Comment, *Protecting the American Taxpayers: Assigning the FDIC's Six-Year Statute of Limitations to Third Party Purchasers*, 24 Tex. Tech. L. Rev. 1169, 1200 (1993) [hereinafter "Boteler"]; *cf.*, Petition for Writ of Certiorari ("Petition for Cert.") at 4.

For approximately the last fourteen years, the lower federal and state courts have been very busy addressing issues relating to the rights of purchasers of assets of failed institutions from the FDIC. This is so despite the fact that the fall-out of major banking institutions has had an impact on customers, depositors, and creditors nationwide.

A. This Court Has Only Intervened Twice in Cases of This Type.

For the last fifty-two years, this Court has only found it necessary to intervene in cases involving the rights and obligations of the FDIC or its assignees of this type in two

instances.[3] There are many instances where this Court has not found it necessary to decide cases involving the rights and obligations of assignees (purchasers) of the various federal banking regulators. *See e.g. Bell & Murphy & Assoc. v. InterFirst Bank Gateway*, 894 F.2d 750 (5th Cir.), *cert. denied*, 498 U.S. 895 (1990).

This Court has already denied certiorari to hear a case squarely on point with the present case. *Cadle Co. II, Inc. v. Lewis*, 864 P.2d 718 (Kan. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1613 (1994).

B. The Lower Federal and State Courts Decisions Are Uniform, Thus Demonstrating This Court's Supervision Is Not Necessary.

As noted by the Petition for Cert., over the past several years, numerous courts have considered and decided the issue of whether an assignee of the FDIC is entitled to the benefits of the federal six-year statute of limitations under 12 U.S.C. § 1821(d)(14). One court has noted that there is at least twenty opinions to date, published and unpublished, that discuss this issue.[4] All federal and state courts have held that

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[3] The first instance was in this Court's seminal case of *D'Oench, Duhme & Co., v. FDIC*, 315 U.S. 447 (1942) (No Federal Statute defined the rights of the corporation as holder of the note it acquired). The second instance, some forty-five (45) years later was another leading case, *Langley v. FDIC*, 484 U.S. 86 (1987) (rights of FDIC in its corporate capacity as assignee of FDIC as receiver in note not transferred to an assuming bank under a purchase and assumption transaction).

[4] *Investment Co. of the Southwest v. Reese*, 875 P.2d 1086 (N.M. 1994).

a successor in interest to the FDIC enjoys the benefits of the six-year statute of limitations. Three federal district courts have confronted this issue.[5] One Circuit Court of Appeals has recently addressed this question.[6] Four prior lower state court decisions that held that the federal limitations period could not be transferred, all have been reversed.[7]

Nine opinions from various state courts follow the unanimous federal court opinions. Of these nine state court cases, five (5) have been decided by the highest court of the state[8] and the highest court of the State of

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[5] *Mountain States Financial Resources Corp. v. Agrawal*, 777 F. Supp. 1550 (W.D. Okla. 1991); *North Amer. Credit Consultants v. Garlic Sales and Serv. Co.*, No. 91-1066-C, 1992 WL 477016 (W.D. Okla., Oct. 20, 1992); *Fall v. Keasler*, No. C-90-20643, 1991 WL 340182 (N.D. Cal., Dec. 18, 1991).

[6] *FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993) (holding that assignees of both FDIC and FSLIC are entitled to the six-year statute of limitations).

[7] Three of these come from Texas: *Federal Debt Management v. Weatherly*, 842 S.W.2d 774 (Tex. App. – Dallas 1992), *rev'd*, 37 Tex. Sup. Ct. J. 555 (March 9, 1994); *EKA Liquidators v. Phillips*, No. 4157, 1994 WL 70402 (Tex. March 9, 1994); *Cadle Co. v. Estate of Weaver*, No. D-3866 1994 WL 70403 (Tex. March 9, 1994). The fourth case concerns 28 U.S.C. § 2415(a), *Tivoli Ventures, Inc. v. Tallman*, 852 P.2d 1310 (Colo. App. 1992), *rev'd*, 870 P.2d 1244 (Colo. 1994).

[8] *Federal Debt Management, Inc. v. Weatherly*, 37 Tex. S.Ct. J. 555 (Tex. March 9, 1994); *Tivoli Ventures, Inc. v. Tallman*, 870 P.2d 1244 (Colo. 1994); *Investment Co. of the Southwest v. Reese*, 875 P.2d 1086 (N.M. 1994); *Cadle Co. II Inc. v. Lewis*, 864 P.2d 718 (Kan. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1613 (1994); and *Central States Resources Corp. v. First National Bank in Morrill*, 501 N.W.2d 271 (Neb. 1993).

California has refused to review the reported lower court opinions on this issue.[9]

There are thus no effective federal or state court decisions holding that the benefit of the federal limitations period cannot be assigned to a private party by the FDIC.

Thus, despite the alleged "proliferation of suits by the third party purchasers" characterized by Petitioner herein, this uniformity of decisions among at least nine (9) separate jurisdictions demonstrates that the lower federal and state courts are fully capable of deciding this issue of federal law and that the question presented is not one that should be answered by this court.

C. The Texas Supreme Court Correctly Concluded That § 1821(d)(14) Creates a "Right" Transferrable to Subsequent Purchasers.

Both federal common and statutory law recognize that 12 U.S.C. § 1821(d)(14) is not only a "right" but is also a right which is transferrable to subsequent purchasers of assets from FDIC as Receiver who are not expressly named in the statute. Boteler, *supra*, at 1177; *see also* Brian J. Woram, *FIRREA'S Statutes Of Limitations: Their Availability To Purchasers From The FDIC*, 110 Banking L.J. 292 (1993) [hereinafter "Woram"].

In *FDIC v. Howse*, 736 F. Supp. 1437 (S.D. Tex. 1990), the Defendants argued that since FDIC was acting in its

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[9] *White v. Moriarty*, 19 Cal. Rptr. 2d 200 (Cal. C. App.), *review denied*, (August 12, 1993).

corporate capacity in that action § 1821(d)(14) did not apply because that section purportedly "applies only to actions brought by FDIC as conservator or receiver." *Id.* at 1444-45. In that case, FDIC-Corporate was the assignee of FDIC in its capacity as receiver of certain of the failed institution's causes of action. *Id.* at 1445.

While the literal language of § 1821(d)(14) did not apply directly to FDIC-Corporate, the court in *Howse*, relied upon another provision of the same statute holding that FDIC-Corporate was entitled to "*the same rights and powers as FDIC-R under § 1821.*" *Howse*, 736 F. Supp. at 1445 (emphasis added). The court recognized that pursuant to the language of 12 U.S.C. § 1823(d)(3)(A), FDIC-Corporate was entitled to "all of the *rights*, powers, privileges and authorities of the corporation as receiver under § 1821" with respect to any asset acquired by the corporation. *Id.* at 1445 (emphasis added). "Since one of those *rights* is § 1821(d)(14)'s new limitations periods . . . it follows that § 1821(d)(14) applies equally to FDIC-Corporate." *Id.* (emphasis added)

Similarly, at least one court has held that § 1821(d)(14) applies to the Resolution Trust Corporation ("RTC"), even though RTC is not expressly named in the statute. *RTC v. Krantz*, 757 F. Supp. 915, 922 (N.D. Ill. 1991).[10]

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[10] Pursuant to 12 U.S.C. § 1441A(b)(4), as added by FIRREA, § 501(b)(4), the RTC shall have the same powers and *rights* to carry out its duties . . . as the [FDIC] has under sections 11, 12 and 13 of the Federal Deposit Insurance Act. Section 1821(d)(14) is part of section 11 of the FDIA.

Thus, this "right" is not "manufactured out of thin air by the Texas Supreme Court" as suggested by Petitioner but is created by § 1821(d)(14) itself, and recognized elsewhere in the text of FIRREA and by the courts.

D. Resort To Common Law Is Necessary To Fill Inevitable Statutory Gaps.

Precisely because the statute is silent as to the rights of any other party other than FDIC, the principles of the common law are to be utilized by the courts to fill this statutory gap. *D'Oench, Duhme & Company v. FDIC*, 315 U.S. 447, 469-72 (1942) (Jackson, J., concurring).

The common law of assignments not only supports, but also establishes the assignment of the right, benefit and remedy of the FIRREA statute of limitations provision to purchasers of the FDIC. *FDIC v. Bledsoe*, 989 F.2d 805, 810 (5th Cir. 1993) (and authorities cited therein).

While an assignment would not carry with it all rights, remedies and benefits incidental to the thing assigned *when* a contrary intent appears in the assignment *or when* the right, remedy *or* benefit is personal to the assignor and for his benefit alone, neither of these exceptions are applicable here. Further, the operation of the common law of assignments has absolutely nothing to do with whether or not a party purchasing an asset is doing so for its own benefit.

Not one single case or secondary source which has stated that rights, remedies or benefits personal to assignors and for their benefit alone are not assignable has involved a statute of limitations provision.[11]

II. The Extension of the Benefit of the Six-Year Statute of Limitations to Assignees Does Not Conflict With the Purposes of Statutes of Limitation.

FDM instituted this suit consistent with the purpose of statutes of limitations articulated in the authorities cited by Petitioner. *See* Petition For Cert. at 9-10.

While the primary purpose of statutes of limitation is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend, that "reasonable time" became six years once the FDIC took over the notes in question from Heritage National Bank.

At that time, by operation of law, Petitioner was on notice that the FDIC could have waited six years to bring an action against Weatherly to enforce it. *FDIC v. Hinkson*, 848 F.2d 432, 435 (3rd Cir. 1988) (the 6-year limitation provision, 28 U.S.C. § 2415(a) "does not mandate a federal agency be precluded from suing in less than 6 years on an assigned claim."). Instead, the FDIC chose to sell and assign the Note to FDM. Weatherly did not win the

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[11] See Texas Supreme Court Opinion below. Petitioner is less than candid with this Court when he states that "statutes of limitation have never been treated as rights of plaintiffs – instead courts have uniformly held that statutes of limitation are personal to defendants." Petition For Cert. at 11.

right to repose under a shorter limitations period when the FDIC elected to sell the Note and assign it to FDM. *Fall v. Keasler*, No. C-90-20643, 1991 WL 340182 (N.D. Cal., Dec. 18, 1991).

FDM asserted its cause of action within the reasonable time articulated by the six-year statute of limitations. There is no concern in this case with stale facts, lost evidence or other difficulty in proof, defective memory, death or other unavailability of witnesses.

Nor can it be argued in the context of the extraordinary circumstances of bank failure that allowing "private third parties to assert a state law claim founded on contract beyond the time allowed by a state statute of limitations only frustrates the reasonable commercial expectations of the parties involved." Petition For Cert. at 9.

Clearly, the legitimate expectations of a maker of a note do not include the windfall of escaping liability because of the transfer of the note. Applying a uniform federal statute of limitations would result only in a maker being required to defend suit brought by a transferee during the same period when it could have been brought by the FDIC. As the Tenth Circuit Court of Appeals noted in *Bank of Boulder*, in the context of a federal rule permitting FDIC-Corporate to acquire non-transferrable letters of credit contrary to state law:

> the rule would come into effect only after an insured bank has failed. Parties cannot reasonably expect to carry on normal relationships at that point.

* * *

> [W]e note that if Colorado's transfer restrictions were enforced against FDIC/Corporation in this case, Bank of Boulder would likely receive an unexpected benefit. . . . If FDIC/Corporation is not allowed to enforce the letter of credit . . . then Bank of Boulder will be freed of its obligation to honor drafts of the Receiver of Dominion Bank. Clearly, Bank of Boulder could not have had a reasonable commercial expectation based on state law that if Dominion Bank went bankrupt, Bank of Boulder would be relieved of all liability under the letter of credit.

Bank of Boulder, 911 F.2d at 1147.

In the instant case, Petitioner Weatherly's expectations at the time he borrowed money from Heritage National Bank presumably included the ultimate repayment of his notes; he should not be given the windfall of forgiveness of his notes because of the vehicle by which FDIC sought to realize upon them.

III. The Decision of the Texas Supreme Court is in Accord With the Decision in Hinkson and the Decisions of This Court.

Even assuming the decision in *FDIC v. Hinkson*, 848 F.2d 432 (3rd Cir. 1988), were decided the same way under 12 U.S.C. § 1821(d)(14), which would not be the case, it would still not conflict with the Texas Supreme Court decision. *Hinkson*, contrary to Petitioner's argument, does not stand for the proposition that an assignee *of failed bank assets* from the FDIC is not governed by the same statute of limitations that apply to its assignor. Petition For Cert. at 11.

In *Hinkson*, the FDIC received an assignment of the note upon which it brought suit *as a result of an open bank assistance transaction* not by operation of law as a result of bank failure. Section 1821(d)(14) only applies to assets acquired by operation of law[12] initially by a conservator or receiver of an insured depository institution or subsequently acquired by FDIC or RTC in their corporate capacities and private parties (whether banks, individuals or other organizations) by transfer and assignment.

Further, even assuming the result in *Hinkson* was not changed by the current state of the law, which it would be, *Hinkson* merely stands for the proposition that there would be a uniform statute of limitations rule for FDIC and its subsequent assignees – the federal limitations period would govern an action by either FDIC or its assignees. As stated by the court in *Hinkson*:

> The federal limitations period will therefore govern in both instances – whether the state statute provides for a longer or shorter time than section 2415.

Hinkson, 848 F.2d at 434.

Significantly, however, if *Hinkson* were decided today, the FDIC would have been entitled to the longer period under state law. Section 1821(d)(14)(A) overrules *Hinkson* to the extent argued by Petitioner here as follows:

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[12] Pursuant to 12 U.S.C. § 1821(d)(2)(A)(i)&(ii) "The Corporation shall, as conservator receiver, *and by operation of law*, succeed to – (i) all rights, titles, powers, and privileges of the insured depository institution . . . and (ii) title to the books, records, and assets" of the institution.

> (A) IN GENERAL – Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the corporation as conservator or receiver shall be –
>
> (i) in the case of any contract claim, *the longer of* –
>
> (I) The 6-year period beginning on the date the claim accrues; or
>
> (II) *The period applicable under state law.*

12 U.S.C. § 1821(d)(14)(A)(i)(I)&(II) (emphasis added).

Thus, since the State of Delaware has a twenty-year statute of limitations, the FDIC acquiring an asset in Delaware as conservator or receiver, would be entitled to a twenty-year statute of limitations period. In turn, an assignee of FDIC as conservator or receiver would likewise be entitled to the twenty-year statute of limitations period. Thus, the decision in *Hinkson* does not conflict with the decision of the Texas Supreme Court.

Nor does the Texas Supreme Court decision conflict with this Court's decision in *Cressey v. Meyer*, 138 U.S. 525 (1891) or any other decision of this Court.

First, Petitioner's reliance upon *Cressey*, like Petitioner's reliance upon *United States v. Summerlin*, 310 U.S. 414 (1940), is misplaced. There is no point to be made that the United States and its agencies at one time were not subject to state or federal limitations periods.

More importantly, neither *Summerlin* nor *Cressey* involve in any way rights of an assignee or transferee of

the government or its agencies. Thus, neither case can or does stand for the proposition that when the United States was immune from statutes of limitation, such immunity did not pass to its assignees or transferees.

In *Summerlin*, the United States itself was the party which brought suit. As noted by this Court in *Summerlin*:

> By a series of transactions . . . the Federal Housing Administrator, acting on behalf of the United States, became the assignee of a claim against the estate of one J. F. Andrew, deceased.
>
> * * *
>
> The claim assigned to the Federal Housing Administrator acting on behalf of the United States became the claim of the United States, and the United States thereupon became entitled to enforce it.

United States v. Summerlin, 310 U.S. at 414, 416.

In *Cressey*, suit was brought by a creditor of the "sovereign", *not an assignee or transferee*, there is a difference.

Nothing in *Cressey* or *Summerlin* addresses the rights, interests or remedies of the "sovereign" that pass to an assignee or transferee with the assignment of substantive rights. Neither of these cases anywhere expressly states that immunity from the application of statutes of limitations or the doctrine of laches is a personal right of the sovereign. Nor can *Cressey* be so construed vis-a-vis the government and its assignees from the fact that the government "*does not give to [its] creditor* its sovereign exemption from liability to the statute of limitation and the

defense of laches." *Cressey*, 138 U.S. at 528 (emphasis added).

A. The Texas Supreme Court Followed Well-Settled Rules of Statutory Construction.

Respondent agrees that the starting point in any case of statutory construction is the statute itself. *Demarest v. Manspeaker*, 498 U.S. 184 (1991). If the statute's language is plain as to the rights of the parties concerned, "the sole function of the court is to enforce it according to its terms." *Caminetti v. United States* 242 U.S. 470, 485 (1917).

If, on the other hand, the meaning of the statute is doubtful or ambiguous as the rights of the parties involved, the court "construes it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." *West Virginia University Hospitals, Inc. v. Cassey*, ___ U.S. ___, 111 S.Ct. 1138, 1148 (1991).

In the present case, the statute in question, 12 U.S.C. § 1821(d)(14), is neither ambiguous nor unambiguous as to the rights of the parties concerned, i.e., assignees and transferees of assets from the FDIC. *FDIC v. Bledsoe*, 989 F.2d at 809-810. In other words, the clear and unambiguous language of the text itself says nothing about when assignees of the FDIC must bring substantive claims assigned.

Thus, as noted by the Fifth Circuit in *Bledsoe*, "the statutes are absolutely silent" as to the rights of the parties concerned. *Bledsoe*, 989 F.2d at 810. In such an

instance, another axiomatic principle of statutory construction is triggered. "In effectuating Congress' intent, courts are to fill the inevitable statutory gaps by reference to the principles of common law." *Bledsoe*, 989 F.2d at 810.

This court has recognized the principle that source materials of the common law may be used to answer a question presented to the court where reference to the text of the statute alone does not answer the question with regard to the parties concerned. *D'Oench Duhme*, 315 U.S. at 469-72 (Jackson, J., concurring).

This court has also directed the federal courts "to fill the interstices of federal legislation 'according to their own standards' " in areas affecting nationwide federal programs. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979) (*quoting Clearfield Trust Co. v. United States*, 315 U.S. 363, 367 (1943)).

The authorities cited by Petitioner are clearly distinguishable. The statutes being construed in those cases either: (1) expressly mentioned the parties affected by the statute or the specific rights of the specific parties affected; or (2) undertook to deal with rights related to the right in question, in various ways.

The question presented in *Demarest* was whether 28 U.S.C. § 1821 required payment of witness fees to a convicted state prisoner who was brought to testify at a federal trial pursuant to a writ of habeas corpus *ad testificandum*. *Demarest*, 111 S.Ct. at 601. The text of 28 U.S.C. § 1821 provided that "a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by the section." *Demarest*, 111 S.Ct. at 602. The statute further provided that a "subsistence

allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required." *Id.*

Thus, the statute in *Demarest* is far different from the statute in the present case. The category of persons whose rights were being adjudicated were expressly mentioned in the statute.

Similarly, the issue in *West Virginia v. Cassey* was whether the term "witness fees" in a statute designed to shift court costs to losing parties also included "expert fees." *West Virginia,* 111 S.Ct. at 1140-1141. In that case, both the common law and the record of statutory usage of the term "witness fees" clearly evidenced that expert fees were separate from witness fees. *West Virginia,* 111 S.Ct. at 1141-1146. In the present case, both the common law and the application of statutory rights to assignees would require a different result.

Likewise, the statute in question in *In re Shearer,* 139 F. Supp. 217 (N.D. Cal. 1956) provided that "any natural person except a wage earner . . . may be adjudged an involuntary bankrupt." *In re Shearer,* 139 F. Supp. at 218. The petitioner in that case sought review of an order of a Referee adjudicating him an involuntary bankrupt after finding that he was not a "wage earner" within the meaning of the Bankruptcy Act. *Id.* The Bankruptcy Act in that case defined the term "wage earner." *In re Shearer,* 139 F. Supp. at 219. Thus, the category of persons affected was expressly defined in the statute.

Finally, unlike the present case, in *Iselin v. United States,* 270 U.S. 245 (1926), the legislature had exhaustively undertaken to deal with rights related to the

right in question in that case in various ways but omitted any reference to the particular right involved. The question in *Iselin* was whether the sale of a stockholder's opera box tickets which were not sold at ticket offices could be taxed under a statutory provision taxing the sale of tickets at ticket offices. The statute relied upon by the government to impose a tax was not applicable because it only applied to tickets which were regularly sold at ticket offices or other similar places. *Iselin*, 270 U.S. at 247. The tickets sold by the stockholder in question were free tickets which were reserved by the lessor of the opera house for all performances. Thus, the tickets were not regularly sold.

IV. The Extension of Federal Statutory Rights to Assignees, as Well as Congressional Intent Support the Decision of the Texas Supreme Court.

A. Federal and State Courts have extended the statutory provisions of 12 U.S.C. § 1823(e) to entities other than the FDIC.

While the literal language of § 1821(d)(14) speaks directly to the FDIC and not assignees, federal and state courts have not hesitated to extend the protections of 12 U.S.C. § 1823(e) to assignees of FDIC, and other federal banking regulators. Section 1823(e) contains language similar to § 1821(d)(14), speaking only to the FDIC.

A careful read of such cases demonstrates not only that the courts understand the distinction between statutory and common law rights, but also, that they care about the outcome under either scheme. This is evidenced by the fact that the rationale articulated for such

extension is twofold: (1) if a note is enforceable in the hands of the FDIC, it is equally enforceable in the hands of an assignee; and (2) the extension of such rights facilitates Congress' policy of protecting failed institutions' assets and the insurance fund.

In *FDIC v. Newhart*, 892 F.2d 47 (8th Cir. 1989), the Eighth Circuit embraced the extension of § 1823(e) to assignees of the FDIC when it held, in the context of a discussion of that defense, that "the FDIC transfers its protected status to subsequent purchasers of notes it holds." *Newhart*, 892 F.2d at 50.

The district court in *Newhart* found that the terms of § 1823(e) preempted the technical requirements of Missouri holder-in-due-course law once FDIC acquired an asset. *FDIC v. Newhart*, 713 F. Supp. 320, 324 (W.D. Miss.), *aff'd*, 892 F.2d 47 (8th Cir. 1989). The defendant argued that while his defenses were cut off as to FDIC, FDIC's assignee could not assert FDIC's holder-in-due-course status. *Id.* The court disagreed, holding in reliance upon two of its unpublished opinions that:

> [Defendant's] defenses could not be revived simply because the FDIC transferred the note to a third party.

Id.

The district court found the reasoning of the unpublished cases compelling "especially since a contrary result would emasculate the policy behind § 1823(e) of encouraging the FDIC to participate in transfer agreements." *Id.*

The Eighth Circuit affirmed, based on the dual propositions of law, that (1) an assignee stands in the shoes of the assignor, and (2) under Section 3.201(1) of the U.C.C., transfer of an instrument vests in the transferee such rights as the transferor had therein. *Newhart*, 892 F.2d at 50.

Discussing the policy behind § 1823(e), the Eighth Circuit stated as follows:

> In certain cases, such as the instant one, the FDIC may decide to sell returned assets after bringing suit for collection. Because these assets are usually non-performing loans, there would be little or no incentive for prospective purchasers to acquire them if they were subject to the personal defenses of the obligors based on undisclosed agreements. If this avenue of cutting losses became unavailable to the FDIC, purchase and assumption transactions would become more expensive and thus, less likely to occur.

Newhart, 892 F.2d at 50.

Concluding that this policy behind § 1823(e) supported the extension of federal holder-in-due-course status to an assignee bank, the Eighth Circuit stated:

> If holder-in-due-course status did not run with the notes acquired by the FDIC in purchase and assumption transactions, the market for such notes would be smaller, which would have a deleterious effect on the FDIC's ability to protect the assets of failed banks.

Id.

Similarly, in reliance upon the Eighth Circuit in *Newhart*, as well as *Deposit Guaranty Bank v. Hall*, 741 F. Supp. 1287 (S.D.Tex. 1990) and *Kilpatrick v. Riddle*, 907 F.2d 1523 (5th Cir.), *cert. denied*, 498 U.S. 1083 (1991), the court in *Alarcon v. FDIC*, 772 F. Supp. 334 (E.D.Mich. 1991) expressly held that § 1823(e) extends to assignees of the FDIC stating:

> [T]he court fully concurs [with] the proposition that when the FDIC has obtained a note previously held by a bank which has gone into receivership, and assigns the note to another bank, the assignee bank is entitled to the same protection under *D'Oench, Duhme*, and § 1823(e) as the FDIC itself. *In other words, if the note is enforceable in the hands of the FDIC, it is equally enforceable in the hands of the assignee bank.*

Alarcon, 772 F. Supp. at 342 (emphasis added); *see also, Hall*, 741 F. Supp. at 1290 (holding under § 1823(e) defendant was estopped from asserting affirmative defenses against an assignee of the FDIC); *RSR Properties, Inc. v. FDIC*, 706 F. Supp 524, 532 (W.D.Tex. 1989) (applying § 1823(e) to deficiency suit brought by an assignee of the FDIC).

In *Willow Tree Inv., Inc. v. Wagner*, 453 N.W.2d 641, 643 (Iowa 1990), the Iowa Supreme Court in extending § 1823(e)'s protections to assignees noted and rejected an argument identical to that raised by Petitioner here:

> Defendants claim that while the FDIC is granted special protection under § 1823(e), plaintiff, as purchaser, is not similarly insulated from the defenses that defendants could raise against the insolvent bank. *They note that the statute refers only to the "corporation" and makes no mention of*

> *extending its provisions to assignees or purchasers.* We believe that the purpose of § 1823(e) would not be furthered by limiting the application of its provisions to the FDIC.

Willow Tree Inv., 453 N.W.2d at 643 (emphasis added). The same analysis applies with equal force in the present case.

B. Congressional Intent Underlying Section 1821(d)(14) as Well as the Entire Comprehensive Scheme of Facilitating Resolution of Insolvent Institutions and Minimizing the Cost to the Insurance Fund Support the Decision of the Texas Supreme Court.

As noted above, when Congress passed FIRREA, it was not legislating on a clean slate. H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 6 (1989), *reprinted in* 1989 U.S.C.C.A.N. at 87-93, 108. FIRREA "grew out of the acute and massive financial crisis of the thrift industry and the [FSLIC] a situation caused by a number of factors that included a regional economic collapse and fraud and insider abuse." *See*, Explanations to FIRREA, Title I, *Purposes of the Act*, para. 101; FIRREA, Section 101 at para. 2101. In this way, FIRREA builds upon the purposes and intent of the FDIA and the Bridge Bank Statute.

As noted by this court, "the words of a statute, particularly one with a remedial object, have a meaning imparted to them by 'the mischief to be remedied.' " *Aaron v. Securities & Exch. Comm'n*, 446 U.S. 680, 705 (1980) (Blackmun, J., dissenting). By 1989, it had become clear that the savings and loan industry was in dire trouble and emergency legislation was required to restore public confidence in the industry. H.R. Rep No. 54(I) at

90, 98-104. With respect to the extended statute of limitations provision contained in Section 212(d)(14) of FIRREA, codified at 12 U.S.C. § 1821(d)(14), Senator Reigle explained:

> Section 212 of the conference bill provides for extended statute of limitations p[illegible]ds for claims brought by the FDIC in its capacity as conservator or receiver of a failed financial institution. Although these provisions have attracted little attention from the media, they are of the utmost importance. Extending these limitations periods will significantly increase the amount of money that can be recovered by the Federal Government through litigation, and help ensure the accountability of the persons responsible for the massive losses the Government has suffered through the failures of insured institutions. *The provisions should be construed to maximize potential recoveries by the Federal Government by preserving to the greatest extent permissible by law claims that would otherwise have been lost due to the expiration of hitherto applicable limitations periods.*

135 Cong. Rec. S10182-01 at S10205 (Daily ed. Aug. 4, 1989) (emphasis added). Thus, it is clear that the mischief to be remedied was to avoid massive losses to the Government by maximizing the amount of money that could be recovered by the FDIC.

It is further clear that Congress contemplated using the private sector to maximize the amount of money that could be recovered by the FDIC. One of the purposes of FIRREA itself is to "provide funds from public and private sources to deal expeditiously with failed depository institutions." FIRREA, Section 101(8), para. 2101.

Those funds are provided from private sources through the purchase of assets from FDIC under purchase and assumption or bulk sale transactions. *See e.g.*, Sharp, *supra*, at 66.

CONCLUSION

For these various reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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